



DELAWARE

EMPLOYMENT LAW LETTER

Part of your Delaware Employment Law Service

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Associate Editor
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Vol. 19, No. 4
April 2014

SOCIAL MEDIA

Delaware Supreme Court rules on admissibility of Facebook evidence

by Molly DiBianca

Social media has been a hot topic in employment law for years. Social media influences hiring and discipline and may be a source of information in employment-related litigation. In Delaware, there is no prohibition on using social media to make employment decisions. However, there are significant questions about employers' ability to access social media and use the information to support their case at trial. Fortunately for Delaware employers, a recent decision from the Delaware Supreme Court has shed some light on the issue.

What employers should know

Employers may make decisions based on social media "evidence." However, whether employers (or other parties) have the right to search for social media evidence during discovery (the pretrial exchange of evidence) and, if so, how to go about getting it are entirely different questions.

Assuming an employer is able to obtain relevant social media evidence, there is yet another question that must be answered: Is the evidence admissible? There is a split among courts on the appropriate standard for the admissibility of social media evidence. There are two approaches.

First, there is the Texas approach, which requires the proponent of the evidence to make a proffer of authenticity. In other words, if an employer wants social media evidence to be admissible, it has to make some affirmative showing that the evidence is authentic. For example, if an employee denies making a Facebook post, the employer must offer

evidence that the post was not fraudulent. In short, under the Texas approach, the proponent of the evidence does not necessarily need to prove that the evidence is authentic so long as a jury "could reasonably find" it authentic.

Second, there is the Maryland approach. This approach imposes a higher standard and requires the proponent of the evidence to offer proof that the posts are authentic. For example, an employer could ask an employee if she created the profile or made the post, search the employee's Internet history or hard drive, or obtain information from a social networking site. Courts that follow the Maryland approach express concerns that social media evidence could be fake.

Delaware Supreme Court's approach

The Delaware Supreme Court recently weighed in on the issue. In *Parker v. State of Delaware*, the supreme court adopted the Texas approach. The court acknowledged that social media evidence can be falsified but concluded that it should be treated like other forms of evidence. In other words, if an employer seeks to introduce social media evidence, it may use "any form of verification" available under the Rules of Evidence, including "witness testimony, corroborative circumstances, distinctive characteristics, or descriptions and explanations of the technical process or system that generated the evidence."

In my opinion, this is the correct approach. Social media evidence should not be more difficult to authenticate simply because it is "possible" to falsify it. All evidence can be falsified. Making an employer attempt to authenticate a Facebook post by obtaining some kind of verification is more than highly impractical. It can be close to impossible since Facebook will not release much, if any, user information without a criminal subpoena or written consent from the user. *Parker v. State of Delaware*, No. 38, 2013 (Del. Feb. 5, 2014).

Bottom line

The Delaware Supreme Court's ruling is important in Delaware and other jurisdictions where this issue has not yet been decided. The court took a very practical approach to social media evidence and treated it like other forms of evidence. The court's decision provides a level of predictability on this issue, which should be helpful to employers that use social media to vet job candidates or impose discipline for off-duty conduct.

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